Heeding this Court's caution that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," the Ninth Circuit carefully scrutinized each of Plaintiffs' claims for non-justiciable political questions under *Baker v. Carr*. *Alperin*, 410 F.3d at 547 (citing *Baker v. Carr*, 369 U.S. 186, 210-11 (1962)).[2] Taking a "surgical" approach by applying the *Baker* standards separately to each of Plaintiffs' claims, the Ninth Circuit affirmed in part and reversed in part, upholding the dismissal of all claims alleging that "[t]he actions and conduct of Defendants, . . . actively assisted the war objectives of the Ustasha Regime." *Alperin*, 410 F.3d at 558-59.[3]

Thus, contrary to Petitioners' characterization of the claims to be adjudicated, there will be no judicial review of Defendants' assistance of war efforts or any judicial

---

[2] In *Baker v. Carr*, this Court outlined six factors which, if "inextricably" involved, trigger the application of the political question doctrine: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the dispute; (3) the impossibility of deciding the case without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 396 U.S. at 217 (1962).

[3] The dismissed international law violations include claims for aiding and abetting the activities of war criminals, assisting the Nazi backed Ustasha Regime in preserving their Treasury, for the purpose of continuing a Government in Exile, and evading justice for genocidal war crimes, crimes against peace and crimes against humanity (including torture, rape, starvations, physical and mental abuse and summary execution), and slave labor. *Alperin*, 410 F.3d at 543-44, 548, 558-59, 562-63.

condemnation for the wartime actions of a foreign government. *Alperin*, 410 F.3d at 561 n.18. Therefore, the petitions before this Court address only the Ninth Circuit's holding that the claims for property losses are justiciable. *See Alperin*, 410 F.3d at 548-58 (remanding legal and equitable claims for property losses requiring adjudication of "seized assets [that] came to rest with the Vatican Bank . . . as well as any profits earned").

Applying the traditional *Baker* analysis to these property claims, the Ninth Circuit found that "[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Alperin*, 410 F.3d at 551. While the court acknowledged "that the management of foreign affairs predominantly falls within the sphere of the political branches," it found that since the property claims are not the subject of any executive initiative in the conduct of foreign affairs, judicial review would not offend the separation of powers. *Alperin*, 410 F.3d at 549. Plaintiffs' claims are neither barred by, nor referred to, in any treaty. *Alperin*, 410 F.3d at 549-50 (citing *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003)).[4] Nor are the property claims the subject of any executive agreement – including the agreements reviewed in the context of the preemption doctrine in *Am. Ins. Ass'n v. Garamendi*. *Alperin*, 410 F.3d at 550 (comparing property claims to Foundation Agreement in *Garamendi*); *see*

[4] Petitioner OFM's assertion that Plaintiffs' claims are barred by the Italian Peace Treaty of 1947 is an issue of fact not relevant to this pre-discovery stage of the proceedings. *See Alperin*, 410 F.3d at 550 n.11 (finding Treaty of Peace inapplicable to the property claims). Nor is the interpretation of treaty as a defense to Respondents' claims a nonjusticiable political question. Interpretation of treaties falls squarely within the purview of judicial review. *Baker*, 396 U.S. at 212.

also Garamendi, 539 U.S. 396, 405-08 (2003). Moreover, the property claims are not the subject of any executive branch statement of interest or the focus of ongoing government negotiations or settlements "on the horizon." *Alperin*, 410 F.3d at 558.

Therefore, following the *Baker* inquiry, the court held that the discrete issues presented by Plaintiffs' property claims would not require the court to make conflicting pronouncements on foreign policy initiatives. *Alperin*, 410 F.3d at 555. Because there has been no governmental initiative regarding the property claims, the court found no "unusual need for unquestioning adherence to a political decision already made." *Alperin*, 410 F.3d at 557 (citing *Baker*, 369 U.S. at 217). Given the "absence of 'pronouncements' by the political branches regarding the resolution of claims to the Ustasha Treasury," the adjudication of the property claims would not "cause the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Alperin*, 410 F.3d at 558 (citing *Baker*, 369 U.S. at 217). In conclusion, the court noted that "fulfilling our constitutionally-mandated role to hear controversies properly before us does not threaten to cause embarrassment or multiple pronouncements" to the executive branch. *Alperin*, 410 F.3d at 558.

In reviewing the district court's application of the second prong of the *Baker* standard requiring judicially discernible and manageable standards, the Ninth Circuit relied extensively on this Court's recent political question doctrine case *Vieth v. Jubelirer*, 541 U.S. 627 (2004). *See Alperin*, 410 F.3d at 552-55. The Ninth Circuit found that the "Holocaust Survivors' most straightforward claims involve identifiable personal property for which federal statutes, common law, state law, and well-established case law provide concrete

legal bases for courts to reach a reasoned decision." *Alperin*, 410 F.3d at 553. It concluded that, because the claims were governed by legal standard and rule, a court is well-suited to adjudicate the property claims.

The Ninth Circuit based its decision solely on the traditional, well-settled analysis set forth in *Baker v. Carr* and the political question doctrine cases following it. The court properly did not rely on decisions that do not address the political question doctrine or the separation of powers concerns underlying the doctrine. For example, it did not rely on the *Garamendi* decision, which is based on the unrelated constitutional doctrine of federal preemption. *Alperin*, 410 F.3d at 550-51 (distinguishing *Garamendi*). Nor did the court rely on the D.C. Circuit Court decision of *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966), which is based solely on the failure to state a prima facie claim and does not advert to the *Baker* analysis. *Alperin*, 410 F.3d at 554.

Nor did the court improperly focus on the separate identity of Defendants as suggested by Petitioner OFM, but rather focused on the nature of the claims, and whether adjudication presented a nonjusticiable political question. *Baker*, 396 U.S. at 217 (indicating the need for a "discriminating inquiry into the precise facts and posture of the particular case" when distinguishing between "political questions" and "political cases").

Accordingly, review is not warranted, and the petitions should be denied.

REASONS FOR DENYING THE PETITIONS

The Ninth Circuit's decision followed this Court's standards for applying the political question doctrine, and

created no split in circuit court authority. Accordingly, the extraordinary circumstances required for review of an interlocutory order are not present, and the petitions should be denied. *See Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967).

The court's careful inquiry into whether Plaintiffs' claims would implicate any Executive initiative or political decision-making properly balanced the separation of powers concerns underlying the political question doctrine with the general admonition that federal courts should exercise jurisdiction over properly presented "cases and controversies." *See W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409-10 (1990). This Court has cautioned that the political question doctrine is an exception to the exercise of jurisdiction and that the mere presence of foreign policy concerns does not immunize the case from judicial review. *Baker*, 369 U.S. at 211.[5]

The Ninth Circuit's application of *Baker* does not conflict with the decision in *Garamendi* which was decided on the sole basis of the federal preemption doctrine. *See* 539 U.S. 396 (holding that California insurance disclosure

---

[5] Since *Baker*, this Court has rarely invoked the political question doctrine to bar justiciability. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (finding that the evaluation of the training of the Ohio National Guard was a political question due, in part, to the fact that judicial review would be essentially standardless and that the courts did not have the competence to make those determinations); *Goldwater v. Carter*, 444 U.S. 996 (1979) (finding that evaluating the President's power to terminate a treaty presented a political question); *Nixon v. United States*, 506 U.S. 224, 230 (1993) (finding insufficient precision in the language of Article I, section 3, clause 6 of the Constitution to afford any judicially manageable standard of review); and *Vieth v. Jubelirer*, 541 U.S. 267 (plurality finding that political gerrymandering claims presented a nonjusticiable political question).

statute was unconstitutional due to preemption by executive policy to resolve Holocaust-era insurance claims by international tribunal). Neither this Court, nor any lower federal court, has applied the analysis for whether a state statute is preempted to the justiciability inquiry under the political question doctrine. Likewise, the Ninth Circuit appropriately did not depart from the traditional *Baker* analysis for the political question doctrine.

Moreover, the Ninth Circuit concluded that under the *Baker* analysis, the resolution of Plaintiffs' property claims do not require the court to "second guess" any political decision by the executive branch. *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (holding that courts should not "review and perhaps nullify actions of the Executive"). Petitioners' suggestion that the executive agreements regarding Holocaust-era insurance claims addressed in *Garamendi* should govern here is misplaced because the agreements do not refer to any parties before the court or to the Plaintiffs' property claims. *See Garamendi*, 539 U.S. at 421-22; *Alperin*, 410 F.3d at 550-51; *see also* German Found. Agreement, 39 Int'l Legal Materials 1298.

Contrary to Petitioners' broad suggestion that the Ninth Circuit committed error in remanding the property claims, no court has ever held that the judiciary is precluded from resolving property claims that have never been addressed by the political branches through executive agreement, treaty, or formal statement of foreign policy interest. *Cf. Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (adjudication would "undo" executive policy contained in statement of interest and treaties with Japan); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (adjudication barred by executive agreement transferring

claims to Iran claims tribunal); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 489 (D.N.J. 1999) (forced labor claims barred by post-war treaties with Germany); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999) (claims against German companies nonjusticiable under post-war treaties with Germany).

Indeed, the political branches have specifically endorsed international litigation against sovereigns under statutes such as the Foreign Sovereign Immunities Act that provides for jurisdiction over property-related cases arising out of wartime context. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992) (FSIA claims for conversion of property arising out of Argentina's "dirty war"). Property claims arising out of World War II against private entities have also been held to be justiciable. *See, e.g., Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000) (holding no political question in action for damages, accounting, and recovery of looted property arising out of World War II).

Finally, because the Ninth Circuit followed *Vieth v. Jubelirer*, the lower court did not create a split in circuit court authority. Rather, the court properly distinguished the D.C. Circuit Court *Kelberine* case, as it was not decided on the political question doctrine, but rather on the grounds of failure to state a claim because the requested relief had been vested by federal statute to the Executive. 363 F.2d at 995. Unlike this case, the D.C. Circuit Court dismissed the complaint in *Kelberine* because it stated neither cognizable legal violations nor a known tortfeasor. 363 F.2d at 955. The *Kelberine* decision was not based on the political question doctrine and the D.C. Circuit Court of Appeals did not apply it in its recent decision based on the political question doctrine, despite the existence of

historically remote and complex facts. *See Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).[6] Accordingly review is not needed to resolve a non-existent circuit split in the interpretation of the *Baker* standards.

Petitioners have stated no extraordinary reasons justifying review of the Ninth Circuit's decision on an interlocutory order. Review is premature and not warranted to correct a departure from Supreme Court authority under the political question doctrine or to address any split in the circuit courts. Accordingly, the petitions should be denied.

I. THIS COURT'S DECISION IN *GARAMENDI* WAS DECIDED AS A MATTER OF FEDERAL PREEMPTION AND HAS NO BEARING ON THE PRESENT PETITION, WHICH INVOLVES THE POLITICAL QUESTION DOCTRINE

First, Petitioners' assertion that the Ninth Circuit was bound by *Garamendi* is flawed. *Garamendi* was decided on

---

[6] Nor is there a split in the circuits created by the district court cases cited by Petitioners that rely on *Kelberine*, that were never decided on appeal. Moreover, in each viable district court case, the Executive branch had taken clear action that would be implicated by adjudication. *See Burger-Fischer*, 65 F. Supp. 2d at 248 (finding political question where the court would have to pass judgment on previously made reparations agreements between United States and Germany); *Iwanowa*, 67 F. Supp. 2d at 486 (stating that judicial relief would show lack of respect for reparations negotiations conducted by Executive branch); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1115 (C.D. Cal. 2003) (holding existence of treaties and executive agreements addressing the claims created a nonjusticiable political question); *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 758 (N.D. Ill. 2005) (stating that Representative Branches' historical consideration and rejection of reparations to former slaves in lieu of other forms of relief precluded claims under political question doctrine); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 668 (N.D. Cal. 2002) (not viable because implicitly overruled by *Alperin*).

the basis of federal preemption, not the political question doctrine. Federal preemption, a factually and legally distinct doctrine, has no bearing upon the Ninth Circuit's analysis of the political question doctrine. Second, the executive agreements with Germany and the governmental initiatives in favor of resolving insurance claims at the international level which were found to be preemptive in *Garamendi*, neither extinguished nor addressed Plaintiffs' property claims against the Vatican Bank and the OFM. *See Garamendi*, 539 U.S. at 421-22; *Alperin*, 410 F.3d at 550-51; *see also* German Found. Agreement, 39 Int'l Legal Materials 1298. Accordingly, Petitioners' request for review should be denied.

A. The *Garamendi* Decision on Preemption Does Not Apply to the Ninth Circuit's Consideration of Justiciability

Petitioners' assertion that the Ninth Circuit's decision conflicts with *Garamendi* is an obvious misinterpretation of two entirely different constitutional doctrines: the political question doctrine and the preemption doctrine. Grounded in separation of powers, the political question doctrine ensures that the judicial branch will not address questions reserved to the political branches. *See Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers"). The doctrine is a limited exception to the presumption in favor of federal courts exercising Article III jurisdiction over "cases and controversies." *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The *Baker* analysis is designed to preserve the balance between judicial duty to exercise conferred jurisdiction

against the due respect for constitutional prerogatives of the political branches. *Baker*, 369 U.S. at 210-11.

In contrast, the *Garamendi* decision was based on the doctrine of federal preemption resulting in finding unconstitutional a conflicting state insurance statute. *See* 539 U.S. at 401 (stating that the issue is "whether [California insurance law] interferes with the National Government's conduct of foreign relations"). In *Garamendi*, this Court reviewed the scope of federal policy embodied in several executive agreements and statements of interest that specifically addressed the federal preference that Holocaust insurance claims brought against German insurance companies be resolved by an international tribunal, the International Commission on Holocaust Era Insurance Claims. 539 U.S. at 401, 406-07, 416-17.

The preemption doctrine applied in *Garamendi* did not address the political question doctrine, which protects the decisions of the political branches from second-guessing by federal courts. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Nor do Petitioners claim, and did not claim in the Ninth Circuit, that any state law is preempted by any federal action.

Petitioners have cited no judicial authority for the assertion that the Ninth Circuit was bound to apply the reasoning of the doctrine of federal preemption in *Garamendi* to the determination of justiciability under the political question doctrine. Since 1962, the federal courts have consistently followed *Baker*'s analysis of whether the claims before the court involve a textually-demonstrable commitment to the political branches. *See* 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable

constitutional commitment of the issue to a coordinate political department").

Following the controlling *Baker* analysis, the Ninth Circuit acknowledged that the President had the "lead role" in the field of foreign affairs. *Alperin*, 410 F.3d at 549 (citing *Garamendi*, 539 U.S. at 422 n.12). The Ninth Circuit then determined under the political question doctrine authority that, in the absence of any executive policy regarding the Vatican Bank or the resolution of Plaintiffs' property claims, the claims were justiciable. *See Alperin*, 410 F.3d at 550 (comparing the existence of formal executive policy in *Garamendi* to the existence of no executive policy regarding claims in *Alperin*). Unlike this case, *Garamendi* addressed neither the political question doctrine nor the underlying separation of powers concerns. *See* 539 U.S. at 421-22 (deciding that scope of federal power established by several Executive agreements was in conflict with state statute). Accordingly, the reasoning in *Garamendi* is not applicable to this case. *See Baker*, 369 U.S. at 283-84 (Frankfurter, J., dissenting) ("The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic").

Review is not warranted on the basis of any conflict with the federal preemption decision in *Garamendi*, and the petitions should be denied.

B. The Executive Initiatives to Resolve Insurance Claims at Issue in *Garamendi* Do Not Apply to Plaintiffs' Property Claims

In *Garamendi*, this Court found that the executive branch's foreign policy, reflected in several executive agreements, preempted a state insurance statute. 539 U.S. at 421-22. Petitioners erroneously suggest that these

executive agreements and initiatives require a finding that Plaintiffs' property claims are committed by the Constitution to the executive branch. *See* IOR Brief at 19-23. The agreements in *Garamendi* were evaluated specifically for whether the federal government initiatives to resolve insurance claims at an international tribunal preempted plaintiff's insurance claims under a California statute requiring insurance companies to disclose information regarding Holocaust-era insurance policies. 539 U.S. at 406-07. In particular, this Court found that California legislative efforts to pressure insurance companies to disclose information about Holocaust-era insurance policies conflicted with the Executive's initiatives to resolve Holocaust insurance claims by the International Commission of Holocaust Era Insurance Claims (ICHEIC), as expressed by the executive branch through executive agreements. 539 U.S. at 420-26.[7]

---

[7] Petitioners do not mention that the executive agreements at issue in *Garamendi* explicitly left open the availability of the United States' judicial system for resolution of future claims, guaranteeing only a statement of interest, not an independent basis for dismissal. *See* 539 U.S. at 440 (Ginsburg, J., dissenting) ("none of the executive agreements extinguish any underlying claim for relief"). Therefore, the Eleventh Circuit Court of Appeal in *Ungaro-Benages* held that accounting of assets and recovery of interest in company stolen by the Nazi regime were justiciable because, while the German Foundation Agreement which was examined in *Garamendi* demonstrated a U.S. preference for political resolution, it "neither settles the outstanding claim nor directs that all claims be transferred to the Foundation's settlement procedures." 379 F.3d 1227, 1234 (11th Cir. 2004). As a result, "the executive opted not to settle these claims or to transfer the claims to the Foundation, although it had the power to do so." *Ungaro-Benages*, 379 F.3d at 1235. Indeed, forty class action and individual actions against European insurance companies not covered by the executive agreements in *Garamendi* are still pending in the Eastern District of New York. *See, e.g., Lichtig v. Generali*, MDL 1374/M21-89/04CV5694 (MBM); *Littman v. Generali*, MDL 1374/M21-89/04CV5698;

(Continued on following page)

In contrast, there is no executive policy embodied in any agreements to resolve Plaintiffs' property claims against the OFM and the Vatican Bank. *See* Appellee IOR's Answer Brief, 2004 WL 1125507 at 25. It would have been improper for the Ninth Circuit to apply the reasoning in *Garamendi*, in the absence of any evidence that the agreements in *Garamendi* or any other governmental initiatives apply to the resolution of Plaintiffs' property claims. *See* 539 U.S. at 442-43 (Ginsburg, J., dissenting) ("[C]ourts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication"). Accordingly, review is not warranted on the basis of any conflict with *Garamendi*.

II. NO CONFLICT IN THE CIRCUIT COURTS WAS CREATED BY RELYING ON SUPREME COURT AUTHORITY TO DETERMINE THAT JUDICIAL STANDARDS EXIST TO DECIDE PROPERTY CLAIMS, RATHER THAN RELYING ON *KELBERINE*, WHICH DID NOT MENTION THE POLITICAL QUESTION DOCTRINE

In *Baker*, this Court stated that "[p]rominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable

---

Mermel v. Generali, MDL 1374/M21-89/04CV5699; *Monitz v. Generali*, MDL 1374/M21-89/04CV5696; *Nasch v. Generali*, MDL 1374/M21-89/04CV3394; *Rakover v. Generali*, MDL 1374/M21-89/04CV5697; *Schaechner v. Generali*, MDL 1374/M21-89/04CV3395; *Steinberg v. Generali*, MDL 1374/M21-89/04CV3392; *Wolf v. Generali*, MDL 1374/M21-89/04CV5695; *Brown v. Generali*, MDL 1374/M21-89/04CV3390; *Diller v. Generali*, MDL 1374/M21-89/04CV5692; *Gabor v. Generali*, MDL 1374/M21-89/04CV3391; *Greenman v. Generali*, MDL 1374/M21-89/04CV5700; *Greenstein v. Generali*, MDL 1374/M21-89/04CV3393; *Gruber v. Generali*, MDL 1374/M21-89/04CV5693.

standards for resolving it." 369 U.S. at 217. This Court has interpreted this test as an inquiry into whether there are judicial rules and standards applicable to the issues before the court. *See United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990). This interpretation has been followed by the Ninth Circuit, as well as the other circuit courts. *See, e.g., Ungaro-Benages*, 379 F.3d at 1235; *Kadic v. Karadzic*, 70 F.3d 232, 249-50 (2d Cir. 1995); *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992); *Republic of Phillippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988).

The only case cited by Petitioners in support of their argument that the Ninth Circuit decision created a conflict among circuits is *Kelberine*. However, that case did not address the political question doctrine or apply the standards set forth in *Baker*. Rather it decided a motion to dismiss for failure to state a prima facie claim on which relief could be granted. *See Kelberine*, 363 F.2d at 995. Moreover, the D.C. Circuit Court itself has not relied on *Kelberine* as authority for recent decisions based on the political question doctrine. *See Schneider*, 412 F.3d at 198.

Because the Ninth Circuit correctly applied the judicially-manageable-standards prong of the *Baker* test just as it has been applied by the other circuits, including the D.C. Circuit Court, review of this issue is not warranted.

A. The Ninth Circuit Followed Established Supreme Court Authority On the Political Question Doctrine's "Judicially-Manageable Standards" Inquiry

Since *Baker*, this Court has affirmed that even in politically-charged cases, where "the general nature of the inquiry . . . [is] . . . familiar to the courts" the case does not

present a nonjusticiable political question. *See Munoz-Flores*, 495 U.S. at 395-96. Only where the issues before the court require a political policy judgment for which no judicial standards or remedies exist, has this Court found a non-justiciable political question on *Baker*'s second prong. *See Gilligan*, 413 U.S. at 11-12 (holding that supervision of the training of National Guard was beyond judicial cognizance); *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (holding that removal orders for German alien under delegated executive authority under Alien Enemy Act are "matters of political judgment for which judges have neither technical competence nor official responsibility"); *Nixon*, 506 U.S. at 228 (holding that fashioning standards and remedies for Senate impeachment proceedings or remedies lacked judicially manageable standards).[8]

In *Vieth*, this Court affirmed that it is the nature of the inquiry which defines the second prong of the *Baker* analysis – whether its resolution calls for a governmental policy determination or is susceptible to judicial remedy. *See* 541 U.S. at 278 (stating that so long as the "judicial action is governed by *standard*, by *rule*" the claims are justiciable) (emphasis in original).[9] Applying the standards

---

[8] However, the Court in *Gilligan* noted that claims addressing the specific conduct of the National Guard would be justiciable because remedies for injuries arising out of such conduct did exist. 413 U.S. at 5.

[9] Justice Scalia's plurality opinion distinguished the judicially-manageable-standard of population equality regarding voting, where the courts may decide whether a violation has occurred based on three legal factors, from the petitioners' request that the Court decide how a political party's majority status is established, where the courts must navigate a "sea of imponderables." *Vieth*, 541 U.S. at 290. Despite this difficulty in assessing fairness in districting, Justice Kennedy was still cautious about foreclosing all future inquiry when an alleged constitutional right is burdened or denied. *Vieth*, 541 U.S. at 309-10 (Kennedy, J. concurring). Justice Kennedy's reluctance reinforces this Court's

(Continued on following page)

in *Vieth*, the Ninth Circuit correctly reasoned that "[t]he crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin*, 410 F.3d at 552 (quoting *Vieth*, 541 U.S. at 278).

The long-standing focus of this prong of the political question doctrine as an inquiry into the existence of legal rules and standards has been followed by the circuit courts. *See, e.g., Deutsch v. Turner Corp.*, 324 F.3d 692, 713 (9th Cir. 2003) (holding no political question regarding World War II slave labor claims against foreign corporations to the extent claim involved only proper application of a treaty); *Ungaro-Benages*, 379 F.3d at 1230, 1237; *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44 (2d Cir. 1991).

Accordingly, review is not warranted to correct the Ninth Circuit's application of the "standards" prong of *Baker* or to address a conflict in the circuits.

B. *Kelberine* Was Not Based on the Political Question Doctrine and Has Not Been Followed by the D.C. Circuit Court

Petitioners fail to mention that the D.C. Circuit Court's consideration of logistical manageability of the Holocaust survivors' claims in *Kelberine* was not in the

---

warning in *Baker*, recognizing the "necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." 369 U.S. at 217.

context of a political question doctrine analysis, but rather a decision based on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. Rule 12(b)(6). *Kelberine*, 363 F.2d at 992, 995.

Specifically, *Kelberine* was an action to enjoin the Attorney General of the United States and the Secretary of the Treasury from paying to a Swiss corporation any part of $120 million claimed by a class of Holocaust survivors. 363 F.2d at 992. The Circuit Court held that Holocaust survivors' complaint had not stated a basis for which relief could be granted for two reasons: 1) all rights to the funds claimed had been specifically vested in the United States government by federal statute; and 2) the plaintiffs' claims to the funds as framed in the complaint "did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States." *Kelberine*, 363 F.2d at 995. The court reasoned that since the United States had not consented to suit, there was no legal relief that could have been granted "by a court without legislative provision of the means wherewith to proceed." *Kelberine*, 363 F.2d at 995.[10]

---

[10] The "antecedent history" of the *Kelberine* case was extremely complicated. *Kelberine*, 363 F.2d at 991. The $120 million fund claimed by the Holocaust survivors had been the subject of a previous civil suit brought by a European company, Interhandel, in 1948 against the United States under the Trading With the Enemy Act. *Kelberine*, 363 F.2d at 991. After extensive litigation, in 1963, the case was settled by an agreement written and filed in the suit stipulating that stock in possession of the United States as Alien Property Custodian would be sold at public auction and transferred to Interhandel by the Attorney General. *Kelberine*, 363 F.2d at 991. The Holocaust survivor plaintiffs in *Kelberine* claimed that the funds allotted to Interhandel by the previous lawsuit were illegally seized from the plaintiffs by a "number of men and corporations in Europe" acting as part of the "Nazi Conspiracy." 363 F.2d at 992. Because the Attorney General had statutory power to settle

(Continued on following page)

Also, the claims to the property were not framed under a "thesis" "presently susceptible of judicial implementation" and did not "arise under" any rule discoverable by the court. *Kelberine*, 363 F.2d at 995. Finally, the D.C. Circuit Court held that no cognizable claim had been stated where "[t]he events, the witnesses, the *guilty tortfeasors*, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support." *Kelberine*, 363 F.2d at 995 (emphasis added).

In sharp contrast, the property claims brought here have not been committed by federal statute to the executive branch precluding a court from granting relief without "legislative provision." *Kelberine*, 363 F.2d at 995. As the Ninth Circuit noted in this case, Plaintiffs' claims for relief "arise under" clear standards of law, specifically "federal statutes, common law, state law and well-established case law." *Alperin*, 410 F.3d at 553. Most importantly the tortfeasors are known, specified in the complaint, and the converted property is alleged to be traceable to both the OFM and the Vatican Bank.

The D.C. Circuit Court's decision on the basis of a failure to state a claim because the requested relief was committed to the government and the allegations did not specify a known tortfeasor, are not factors in the determination of justiciability under the political question doctrine. Rather, here, the question was properly framed by the Ninth Circuit as whether the claims were capable of

---

the earlier litigation, and settled it by agreeing to sell the property and transfer it to Interhandel, the court concluded the claims could not proceed. *Kelberine*, 363 F.2d at 995.

being remedied by the court as a matter of justiciability under the *Baker* analysis.

The contention that the D.C. Circuit would have decided this issue differently is speculative at best, given that the D.C. Circuit is also bound by this Court's application of the judicially-manageable-standards prong of *Baker* and *Vieth*. Indeed, the D.C. Circuit Court of Appeals recently held that judicially-manageable standards did not exist regarding claims that required the court to second-guess political branch support of covert actions during the Cold War. *Schneider*, 412 F.3d at 196-97. In deciding that there were no manageable judicial standards to resolve the claims, the D.C. Circuit Court notably did not rely on the *Kelberine* analysis. Rather, it focused on the fact that the claims would require evaluating the executive branch's decisions concerning national security during the height of the Cold War. *Schneider*, 412 F.3d at 196-97. Interestingly, the D.C. Circuit Court did not refer to *Kelberine* even though the underlying actions occurred thirty-five years ago and required extensive discovery.[11]

The district court cases relying on *Kelberine* cited by Petitioners are inapplicable to the Ninth Circuit's decision, have never been reviewed by a federal court of appeals and

---

[11] Similarly, the district court's decision in *Ibrahim v. Titan Corp.* cited *Vieth* as the appropriate authority for the "standards" inquiry. *See* 391 F. Supp. 2d 10, 15 (D.D.C. 2005) (holding that claims brought by Iraqi national detainees for alleged torture at Abu Ghraib did not present political question). Like the Ninth Circuit in *Alperin*, the court noted that while manageability problems may emerge at a later stage, the case should not be dismissed on justiciability grounds. *Ibrahim*, 391 F. Supp. 2d at 16.

cannot create conflict among the circuit courts.[12] In each case, the district court found a non-justiciable political question where the court would have to pass judgment on previously made decisions regarding the claims by the political branches. *See Burger-Fischer*, 65 F. Supp. 2d at 282 (finding political question where the court would have to pass judgment on previously made reparations agreements between United States and Germany); *Iwanowa*, 67 F. Supp. 2d at 486 (stating that judicial relief would show lack of respect for reparations negotiations conducted by executive branch); *Anderman*, 256 F. Supp. 2d at 1115 (holding existence of treaties and executive agreements addressing the claims created a nonjusticiable political question); *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 758 (stating that Representative branch's historical consideration and rejection of reparations to former slaves in lieu of other forms of relief precluded claims under political question doctrine).[13]

Petitioners' attempts to focus on whether the case is factually and legally complex, rather than on whether constitutionally the judiciary is competent to adjudicate the claims, is unsupported by authority of this Court or the circuit courts that have adjudicated property claims arising in political contexts. Cases that involve the application or interpretation of the law do not present nonjusticiable

---

[12] The district court decisions cited by Petitioners, which imported the *Kelberine* logistical language into the political question doctrine, have never been reviewed on appeal.

[13] *Zivkovich v. Vatican Bank* presented identical claims to the Plaintiffs' claims and was dismissed on identical political question doctrine grounds prior to the Ninth Circuit's decision in this case. 242 F. Supp. 2d at 668. It was never appealed to the Ninth Circuit and cannot be cited as support for a split among circuit courts.

political questions because the court is merely serving its primary function. *See Japan Whaling Ass'n*, 478 U.S. 221. Accordingly, there is no conflict among the circuit courts for which review is warranted. The petitions should be denied.

C. Property Claims Arising In the Context of Wartime Are Not Barred by the Political Question Doctrine

Contrary to Petitioners' assertion, there is no "near unanimous" body of authority holding that all claims for property losses occurring during wartime are nonjusticiable. *See* Petitioner IOR's Brief at 24. Rather, there is substantial authority demonstrating that federal courts are well within their constitutional power to adjudicate tort and property claims arising out of wartime. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (adjudicating property rights and other constitutionally based claims and rejecting President's decision to nationalize war industry in midst of Korean War); *Mitchell v. Harmony*, 54 U.S. 115 (1851) (examining actions of agents of President as Commander in Chief in wartime and awarding damages to civilian for seizure of property by military officer during war with Mexico); *Nemariam v. Fed. Democratic Republic of Ethiopia*, 315 F.3d 390 (D.C. Cir. 2003) (reversing dismissal on *forum non conveniens* grounds of thousands of property claims brought by Eritreans against Ethiopia arising during the Ethiopian-Eritrean war); *Siderman de Blake*, 965 F.2d at 713 (FSIA claims for conversion of property arising out of Argentina's "dirty war"); *Bodner*, 114 F. Supp. 2d 117 (holding no political question in action for damages, accounting, and recovery of looted property arising out of World War II);

Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (entertaining claim for unconstitutional taking and breach of contract arising out of World War II and its aftermath); *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983), vacated on other grounds and remanded by 417 U.S. 1113 (1985) (concluding that claims to property takings abroad caused by U.S. officials' decision to establish a military training facility did not present nonjusticiable political question); *see also* Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs 63-76 (1992) (noting "long strand of federal decisions" adjudicating property rights where case manifested foreign affairs and national-security aspects).[14]

Indeed, Congress has determined that courts are particularly competent to resolve property claims touching on foreign relations under the Foreign Sovereign Immunities Act ("FSIA"), under which Plaintiffs assert jurisdiction for their property losses.[15] Therefore, the Ninth Circuit

---

[14] In the international context, the European Court of Human Rights has resolved over 80,000 World War II-related property claims. *See, e.g., Broniowski v. Poland*, 31443/96 [2004] ECHR 274 (2004) (holding for plaintiff against the Polish government in real property claim; also establishing that the court may order national relief to a class of similarly situated claimants where there has been a widespread, systematic violation.)

[15] Likewise, the Hickenlooper Amendment to the FSIA allows jurisdiction over property and tort losses caused by acts of terrorism. *See* 22 U.S.C. 2370 (2005). Moreover, the Executive has signed and Congress ratified several treaties, including the North American Free Trade Agreement and several bilateral investment treaties that assign property claims to be resolved by the courts without provision for special wartime consideration. *See* http://www.nafta-sec-alena.org/defaultsite/index (NAFTA text); http://www.state.gov/e/eb/rls/fs/22422.htm (bilateral investment treaties).

correctly analogized similar claims for the recovery of property stolen or looted during World War II when determining there were judicially discoverable and manageable standards, despite the politicized circumstances. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court granted certiorari for the limited question of whether the FSIA applies to conduct prior to its enactment.[16] As here, the legal framework existed for courts to resolve *Altmann*'s property claims – claims that included declaratory relief, replevin, rescission, as well as damages for expropriation and conversion, violations of international law, imposition of a constructive trust, restitution based on unjust enrichment, and disgorgement of profits. 541 U.S. at 700-01.[17]

---

[16] Notably, the Court did not address the political question doctrine where it reasonably could have been a bar to jurisdiction. *See* Fed. R. Civ. P. 12(h)(3); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979). When based on the power or appropriateness of the Court to act, it would be well within the Court's power to raise the issues *sua sponte*. *See Rescue Army v. Mun. Court*, 331 U.S. 549, 570 (1947) (viewing justiciability as founded in the role of federal judicial review: "Like the case and controversy limitation itself and the policy against entertaining political questions, [footnote omitted] [the policy of strict necessity in disposing of constitutional issues] is one of the rules basic to the federal system and this Court's appropriate place within that structure").

[17] Petitioners' attempt to delineate between tangible goods in *Altmann* and fungible assets is an irrelevant distinction to the issue of justiciability. There are no less judicial rules or remedies for tort and property law violations when the res has been converted, than for an action for a specific res. *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1584 (10th Cir. 1990) (adjudicating conversion claims involving gold mine with "complex facts underlying the many disputes between the parties"); *Archie Comic Publ'ns, Inc. v. DeCarlo*, 141 F. Supp. 2d 428, 430 (D.N.Y. 2001) (adjudicating conversion claims involving comic strip with "complex facts"). There are no governmental policy decisions reserved to the political branches regarding fungible

(Continued on following page)

Property claims against banking institutions for their participation in World War II activities have also withstood political question doctrine challenges. *See, e.g.*, *Ungaro-Benages*, 379 F.3d at 1230, 1237 (Plaintiff's claims that the Nazi Regime's program of "Aryanization" stole her family's interest in its manufacturing company "can be resolved through judicially discoverable and manageable standards"); *Bodner*, 114 F. Supp. 2d 117 (class action brought by Jewish customers of French banking institutions to recover specific sums of money and deposited assets stolen and retained by defendant banks decided on merits without mention of the political question doctrine).

---

property claims or non-fungible property claims. Moreover, courts are equipped to adjudicate complex money laundering cases which involve voluminous, yet judicially manageable issues. *See United States v. Casamento*, 887 F.2d 1141, 1150 (2d Cir. 1989) (finding that "[t]he clearest indication that the jury was able to evaluate the evidence, despite its being voluminous, is provided by the jury's verdicts themselves."); *United States v. Bieganowski*, 313 F.3d 264, 282 (5th Cir. 2002) (explaining that "[t]he district court, however, had previously designated the case as complex, and the record . . . contains repeated reference to . . . the volume of discovery."); *United States v. Owens*, 159 F.3d 221, 227 (6th Cir. 1998) (noting that "the trial involved a complex, multi-object conspiracy and collateral issues of state law tried to a jury over the course of months"); *United States v. Thomas*, 774 F.2d 807, 811 (7th Cir. 1985) (upholding an ends-of-justice continuance based on the complexity of a fraud case with numerous defendants and thousands of financial documents); *United States v. Wadena*, 152 F.3d 831, 850 (8th Cir. 1998) (upholding the district court's refusal to sever even though the trial was complex and lengthy); *United States v. Johnson*, 297 F.3d 845, 859 (9th Cir. 2002) (noting that "[i]t is beyond dispute that the proceedings in this case were lengthy and complex. However, any prejudice that might have stemmed from the complexity of the trial was avoided by the district court's skillful handling of the case"); *United States v. Wellington*, 754 F.2d 1457, 1467 (9th Cir. 1985) (upholding the complexity of a mail fraud prosecution as a proper ground for the granting of a continuance).

Competency of courts to adjudicate and remedy property claims arising during the Holocaust-era is further supported by courts retaining jurisdiction to approve the settlement and distribution of claims in several large class actions. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 168 (S.D.N.Y. 2000) (approving settlement of class action against Austrian banks for conversion of Nazi victims' assets and for profiting from their forced slave labor); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), *aff'd*, 413 F.3d 183 (2d Cir. 2005) (approving settlement of consolidated class actions brought by Holocaust victims against two leading Swiss banks); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 81 (2d Cir. 2001) (approving settlement of consolidated class action brought by groups persecuted by Nazi Regime during World War II against Austrian and German banks seeking redress for various torts and international law violations).

Petitioners' argument that property claims in the context of war are *de facto* committed to the political branches does not comport with the international litigation arising under the expropriation of property exception under the FSIA, the Foreign Corrupt Practices Act, or the Alien Tort Statute. *See, e.g., Siderman de Blake*, 965 F.2d 699 (FSIA claims for property losses during Argentina's "dirty war"); *Bodner*, 114 F. Supp. 2d 117 (ATS claims for property losses during World War II).

Accordingly, the Ninth Circuit's decision is in accord with federal court precedent on the political question doctrine and the adjudication of property claims arising in a wartime context. Review is not warranted, and the petitions should be denied.

III. JUDICIAL REVIEW OF PROPERTY LOSSES DOES NOT OFFEND THE CONDUCT OF FOREIGN RELATIONS

Contrary to Petitioners' assertions, there has been no executive initiative to resolve Plaintiffs' claims. The cases cited by Petitioners uniformly involve situations in which a court was confronted with the possibility of rendering a decision which threatened to duplicate, interpret, or conflict with concrete affirmative actions taken by the political branches in the conduct of foreign affairs. *See, e.g., Regan v. Wald*, 468 U.S. 222, 242 (1984) (holding that executive decision to maintain prohibition of travel to Cuba under authority of Section 5(b) of the Trading with the Enemy Act not subject to judicial review); *Harisiades v. Shaughnessy*, 342 U.S. 580, 581-84 (1952) (holding that judicial review of scope of alien expulsion power provided by Congress in Alien Registration Act of 1940 was improper).

In *Joo v. Japan*, the D.C. Circuit Court declined to second guess clear federal foreign policy in order to maintain separation of power. 413 F.3d at 53. Unlike the claims here, the claims were nonjusticiable in light of both U.S. treaties with Japan waiving claims by Allied nationals, as well as a Statement of Interest by the Executive demonstrating that adjudication "would undo" a settled foreign policy of state-to-state negotiation with Japan. 413 F.3d at 53.[18]

In this case, there is no treaty showing federal intent to preclude the judiciary from hearing Ustasha-related

---

[18] The 1951 peace treaty with Japan clearly intended to remove United States judicial involvement from Japanese World War II-related claims and the State Department filed a statement of interest emphasizing that intent of the treaty. *See Joo*, 413 F.3d at 48-52.

cases. Rather, the Ninth Circuit, like the Eleventh Circuit in *Ungaro-Benages*, held that there was no political question where the Executive opted to not settle claims notwithstanding the power to do so. 379 F.3d 1227.

The Ninth Circuit also noted that there are no executive agreements extinguishing the Holocaust Survivor's claims against Petitioners. *Cf. Dames & Moore*, 453 U.S. at 680.[19] Nor is there even evidence of governmental negotiations regarding Plaintiffs' claims.[20]

Without any political branch initiative addressing the stolen property claims, the Ninth Circuit properly concluded that judicial review would not interfere with any conduct of foreign relations by the political branches. It stated, "[i]ndeed, this case is before us not because the

---

[19] Even if there were treaties barring or addressing the claims against the Vatican Bank, the interpretation of war-time treaties explicitly barring certain claims is justiciable and within the power of the judiciary. *See Joo*, 413 F.3d at 52 ("It is of course true, as the appellants point out, that in general 'the courts have the authority to construe treaties and executive agreements' ") (citing *Japan Whaling Ass'n*, 478 U.S. at 230); *see also Ungaro-Benages*, 379 F.3d at 1235-36. Moreover, while executive statements of interest clarifying or interpreting post-war treaties to bar claims are entitled to weight in the interpretation of treaties and the history of management of certain issues by the executive, they are not dispositive of the issue of justiciability. *See Joo*, 413 F.3d at 52 (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) and *Baker*). In *Rasul v. Bush*, claims brought by detainees arising out of hostilities between the United States and the Taliban were held justiciable despite the government's argument that the conduct of foreign affairs is committed to the political branches. 542 U.S. 466 (2004).

[20] The 1999 London Conference on Nazi Gold (organized by the British, not the United States) did not address the resolution of claims diplomatically. Rather, the Report makes clear that the Conference's purpose was to "illuminate long obscured facts" and to complete the "historical record."

Holocaust Survivors disagree with a political decision made regarding their claims, but rather because there simply has been no decision." *Alperin*, 410 F.3d at 557.

The Ninth Circuit correctly reasoned that adjudication does not "frustrate the operation of the particular mechanism the President has chosen," because there is no chosen mechanism. *Garamendi*, 539 U.S. at 424. Accordingly, judicial review of the property claims in no way thwarts executive discretion to set foreign policy and does not require the courts to second guess any known executive initiative.

Review is not warranted due to any threat to foreign policy, and the petitions should be denied.

IV. NO EXTRAORDINARY CIRCUMSTANCES JUSTIFY REVIEW OF AN INTERLOCUTORY ORDER

This Court generally does not issue a writ of certiorari to review an interlocutory order unless it is necessary to prevent extraordinary inconvenience and embarrassment. *Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). This case has been remanded to the district court for litigation on Petitioners' pre-answer motions to dismiss. Indeed, the Ninth Circuit noted that "[c]oncerns about class certification, discovery, and allocation, among other issues, are matters to be resolved at a later time." *Alperin*, 410 F.3d at 555. That fact alone is sufficient grounds for denying the petitions. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application").

Petitioners have posited no compelling reasons or extraordinary circumstances warranting review. The Ninth Circuit's decision has created no conflict among the circuit courts or with the decisions of this Court. Given the interlocutory nature of this appeal, a writ of certiorari is untimely. Accordingly, the petitions should be denied as premature.

CONCLUSION

Review of this interlocutory order is unwarranted by any conflict with this Court's decisions or by any conflict in the circuit courts. The petitions should be denied.

Respectfully submitted,

THOMAS EASTON
LAW OFFICE OF
THOMAS EASTON
2890 Emerald Street
Eugene, OR 97403
Tel: (541) 344-6111

JONATHAN H. LEVY
37 Royale Pointe Drive
Hilton Head, SC 29926
Tel: (202) 318-2406

K. LEE BOYD
Counsel of Record
PEPPERDINE UNIVERSITY
LAW SCHOOL
24255 Pacific Coast Highway
Malibu, CA 90263
Tel: (710) 506-7684

WINDLE TURLEY
LAW OFFICES OF WINDLE
TURLEY, P.C.
1000 Turley Law Center
6440 North Central Expressway
Dallas, TX 75206
Tel: (214) 691-4025

December 14, 2005

FILED
MAY 23 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-539

IN THE

Supreme Court of the United States

ISTITUTO PER LE OPERE DI RELIGIONE,
an instrumentality of a foreign sovereign,

Petitioner,

v.

EMIL ALPERIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JEFFREY S. LENA
LAW OFFICE OF JEFFREY S. LENA
1152 Keith Avenue
Berkeley, CA 94708-1607
(510) 665-1713

MICHAEL R. DOYEN
DANIEL P. COLLINS*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner

* *Counsel of Record*

TABLE OF CONTENTS

Page(s)

I. THE NINTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT AS TO WHETHER THERE ARE "JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS" GOVERNING THE RESOLUTION OF CLAIMS FOR REDRESS OF WORLD-WAR-II-ERA LOSSES 1

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GARAMENDI* 6

TABLE OF AUTHORITIES

Page(s)

CASES

Alperin v. Vatican Bank,
(9th Cir.2005) 410 F.3d 532 7

American Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003)..... *passim*

Arakaki v. Lingle,
423 F.3d 954 (9th Cir. 2005) 4

Baker v. Carr,
369 U.S. 186 (1962)..... 3

Beneficial Nat'l Bank v. Anderson,
539 U.S. 1 (2003)..... 10

Bodner v. Banque Paribas,
114 F. Supp. 2d 117 (E.D.N.Y. 2000) 6

Central Bank v. First Interstate Bank,
511 U.S. 164 (1994)..... 10

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001) 5

Green Tree Fin. Corp.-Alabama v. Randolph,
531 U.S. 79 (2000)..... 10

In re Assicurazioni Generali S.p.a. Holocaust Ins. Litig.,
340 F. Supp. 2d 494 (S.D.N.Y. Oct. 14, 2004)..... 8

In re Austrian & German Bank Holocaust Litig.,
80 F. Supp. 2d 164 (S.D.N.Y. 2000) 5

CASES—Continued

In re Holocaust Victim Assets Litig.,
105 F. Supp. 2d 139 (E.D.N.Y. 2000) 5

Kelberine v. Societe Internationale,
363 F.2d 989 (D.C. Cir. 1966) ..... *passim*

Randall v. United States,
95 F.3d 339 (4th Cir. 1996) 4

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 6, 10

Rosner v. United States,
231 F. Supp. 2d 1202 (S.D. Fla. 2002) 6

Schneider v. Kissinger,
412 F.3d 190 (D.C. Cir. 2005) 5

Steinberg v. International Comm'n on Holocaust Era Ins. Claims,
133 Cal. App. 4th 689
34 Cal. Rptr. 3d 944 (2005) 1, 7, 8

Ungaro-Benages v. Dresdner Bank AG,
379 F.3d 1227 (11th Cir. 2004) 1, 5

Whiteman v. Dorotheum Gmbh & Co.,
__ F.3d __, 2005 WL 3117196
(2d Cir. Nov. 23, 2005) 1, 5

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964) 4

FEDERAL RULES

Fed. R. Civ. P. 12(b)(1) 4

Fed. R. Civ. P. 12(b)(6) 4

MISCELLANEOUS

Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 Berkeley J. Int'l L. 11 (2002) 4

Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. Rev. 1177 (2004) 4

Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U.L.Q. 795 (2002) 4

Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. Ann. Surv. Am. L. 623 (2003) 4

REPLY BRIEF FOR THE PETITIONERS

Since the petition in this case was filed, the need for this Court's review has become only more apparent. Exacerbating the clear split between the Ninth Circuit and the D.C. Circuit over whether the resolution of World-War-II-era claims raises nonjusticiable political questions, the Second Circuit's recent decision in *Whiteman v. Dorotheum Gmbh & Co.*, __ F.3d __, 2005 WL 3117196 at *11 n.16 (2d Cir. Nov. 23, 2005), explicitly rejected the Eleventh Circuit's narrow reading of the political question doctrine in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004)—a decision upon which Respondents heavily rely. *See* Br. in Opp. 13, 15, 17, 25, 28. Moreover, the California Court of Appeal recently expressly rejected the Ninth Circuit's decision in this case, holding that the Ninth Circuit plainly misconstrued this Court's opinion in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). *See Steinberg v. International Comm'n on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 700, 34 Cal. Rptr. 3d 944, 952 (Oct. 20, 2005). The growing disarray among the lower courts with respect to the important issues presented here only underscores the need for this Court's review.

I. THE NINTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT AS TO WHETHER THERE ARE "JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS" GOVERNING THE RESOLUTION OF CLAIMS FOR REDRESS OF WORLD-WAR-II-ERA LOSSES

1. As Petitioner IOR has explained, *see* Pet. 9-18, the Ninth Circuit majority in this case created a clear circuit split by explicitly rejecting as "anachronistic" the D.C. Circuit's opinion in *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966), which held a comparable action to be non-

justiciable. Pet. App. 32a. Despite the fact that *Kelberine*'s political question holding has been unanimously recognized and followed by the lower courts—until the panel's decision in this case—Respondents nonetheless contend that *Kelberine* "did not address the political question doctrine" at all. Br. in Opp. 15. Respondents argue that *Kelberine* was instead based on "the grounds of failure to state a claim because the requested relief had been vested by federal statute to the Executive." Br. in Opp. 8; *see also id.* at 18-19. Respondents' argument rests on a clear misreading of the D.C. Circuit's opinion.

a. Respondents' argument erroneously conflates two separate sections of *Kelberine*, one of which addresses the dismissal of the claims against defendant Interhandel and the other of which addresses the dismissal of the suit *with respect to the United States*. Br. in Opp. 18-19 & n.10. In *Kelberine*, the plaintiffs had named the Attorney General as an additional defendant on the theory that any judgment they obtained against Interhandel could be satisfied out of funds that the Attorney General was about to pay over to Interhandel in connection with the Government's settlement of a separate suit. 363 F.2d at 991-92. In section "III" of its opinion, the *Kelberine* court dismissed the suit against the Government officers based upon sovereign immunity. *Id.* at 994. Because the court also had found that Interhandel was subject to personal jurisdiction in the district court, 363 F.2d at 992-94, the court went on to address, in section "IV," whether the action against Interhandel was viable, and it is in *that* separate section that the court held the suit to be nonjusticiable. *Id.* at 995.

Contrary to Respondents' confused reading of the case, nowhere does the D.C. Circuit suggest that its political question holding with respect to Interhandel rested on the Government's sovereign immunity. Indeed, Respondents' reading of *Kelberine* is illogical: the fact that the court had concluded

that the Government could not be sued with respect to the particular funds it held for Interhandel does not imply that a judgment against Interhandel could not have been entered (and satisfied by attempting to execute against *other* property).

b. It is beyond dispute that the *Kelberine* court's dismissal of the claims against Interhandel, in section IV of the opinion, was based on the political question doctrine. The D.C. Circuit unanimously held that the claims against Interhandel were properly dismissed because the case was not "susceptible of judicial implementation" in light of its unmanageability. 363 F.2d at 995. Moreover, *Kelberine* underscored the political nature of the question presented by specifically referring, no less than four times, to the lack of guidance from the political branches.[1] Although *Kelberine* does not utter the magic words "political question," the language of the opinion leaves no doubt that the decision rested upon a holding that the matter was nonjusticiable because there was a "lack of *judicially discoverable and manageable standards for resolving it.*" *Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying this as the second of six alternative formulations of the political question doctrine) (emphasis added).

Furthermore, in the nearly forty years since *Kelberine*, *every* single court to address the issue (until the panel decision in this case) had concluded that *Kelberine* rested on the second *Baker* formulation of the political question

---

[1] *See* 363 F.2d at 995 (suit was unmanageable if "undertak[en] by a court without legislative provision of the means wherewith to proceed"); *ibid.* ("It may be that the Congress might enact a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it."); *ibid.* (describing dispute as presenting an "insoluble problem if undertaken by the courts without legislative or executive guidance"); *ibid.* (holding that the suit could not proceed "in the absence of specific legislative or executive formulation").

doctrine. *See* Pet. 11-12 (collecting cases).[2] The academic commentary has likewise repeatedly acknowledged that *Kelberine* rested on the political question doctrine. *See, e.g.*, Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. Rev. 1177, 1182 & n.31 (2004); Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. Ann. Surv. Am. L. 623, 638 & n.81 (2003); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U.L.Q. 795, 805 n.23 (2002); Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 Berkeley J. Int'l L. 11, 13 & n.8 (2002).

c. Respondents nonetheless argue that section IV of *Kelberine* does not rest on the political question doctrine because it states that the action was correctly dismissed "for failure to state a claim upon which relief can be granted," 363 F.2d at 995. *See* Br. in Opp. 15. This concluding remark is too slender a reed to bear the weight Respondents place upon it. As the Ninth Circuit itself has recently noted, "whether dismissal on political question grounds is jurisdictional or prudential in nature, and thus whether it is properly classified under Rule 12(b)(1) or 12(b)(6), is unclear." *Arakaki v. Lingle*, 423 F.3d 954, 962 (9th Cir. 2005).[3] Accordingly, the

---

[2] The fact that these cases were not reviewed by the respective courts of appeals (Br. in Opp. 9 n.6) does nothing to undermine the fact that these cases unanimously confirm that the *Kelberine* decision *itself* is grounded in the political question doctrine, *i.e.*, they confirm the split between the Ninth Circuit and the D.C. Circuit.

[3] *See also WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 637 (1964) (stating that the court below had dismissed the complaint "on the ground that it failed to state a claim upon which relief could be granted, *since the issues raised were nonjusticiable*") (emphasis added); *Randall v. United States*, 95 F.3d 339, 342 (4th Cir. 1996) (stating that the district court also "dismissed Plaintiff's constitutional claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted" because it

use of failure-to-state-a-claim language does nothing to subtract from *Kelberine*'s obvious reliance on the political question doctrine.[4]

2. In response to the overwhelming authority holding that the redress of wartime injuries is committed to the political branches, *see* Pet. 24 (collecting cases), Respondents cobble together a disparate collection of cases, virtually none of which directly addressed the justiciability of World-War-II-era reparations claims. Br. in Opp. 22-26. The only case that Respondents cite that explicitly rejects the application of the political question doctrine in the World-War-II context is the Eleventh Circuit's decision in *Ungaro-Benages*, 379 F.3d at 1235-37 (dismissing the case on comity grounds instead). After the Petition in this case was filed, however, the Second Circuit expressly rejected *Ungaro-Benages* on this point, *Whiteman*, __ F.3d __, 2005 WL 3117196 at *11 n.16, thereby deepening the divisions in the lower courts and further confirming the need for this Court's review.

Of the remaining cases Respondents cite that involved World-War-II-related claims, three of them involved approval of *settlements*,[5] and the remaining three cases (all of which involved the defendants' alleged receipt of specifically identi-

---

found, "*inter alia*, that Plaintiff's due process claims were nonjusticiable").

[4] Respondents also note that the D.C. Circuit did *not* cite *Kelberine* in its recent political question decision in *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). Br. in Opp. 8-9, 15, 20. This dog-that-didn't-bark approach is especially dubious where the two cases are factually distinct, *cf. Schneider*, 412 F.3d at 191 (single wrongful death action), and where there have been so many dogs that *did* bark. *See* Pet. 11-12 (collecting cases and authorities construing *Kelberine*).

[5] *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000), *affirmed sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 148-49, 153 (E.D.N.Y. 2000).

fiable items of property) do not address the political question issue at all.[6] Respondents contend that the distinction between fungible assets and specifically identifiable property is irrelevant, Br. in Opp. 24-25 n.17, but none of the cases they cite on this point even addresses the justiciability of wartime claims for redress. Moreover, Respondents' assertion that no relevant "governmental policy decisions" suggest such a distinction, *ibid.*, is belied by the fact that the U.S.'s earliest post-war treaties drew precisely such a distinction. *See* Pet. 17 n.6.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GARAMENDI*

As the IOR has explained, the Ninth Circuit's holding conflicts with *Garamendi*'s analysis of the scope of executive power as well as its description of the substance of executive policy. Pet. 18-27. Respondents suggest that what the *Garamendi* Court described as the "consistent Presidential foreign policy" in favor of resolving World-War-II-era property disputes by negotiations rather than by "litigation or coercive sanctions," 539 U.S. at 421, applies only to the extent that there is an *actual* executive agreement that covers the specific parties and claims in question. Br. in Opp. 7, 12-14. For multiple reasons, this argument fails.

---

[6] *See Republic of Austria v. Altmann*, 541 U.S. 677, 700-01 & n.21 (2004) (emphasizing narrowness of holding); *id.* at 714 (Breyer, J., concurring); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 129 n.9 (E.D.N.Y. 2000) (suit by accountholders against their former banks; court noted that political question issue was not raised); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1205 (S.D. Fla. 2002) ("Plaintiffs maintain that the property on the [train] was identifiable" because it was "in locked containers with the names and addresses of the owners on the outside"); *see also* Pet. App. 27a (Ninth Circuit opinion) (acknowledging that *Altmann* does not address political question doctrine); *id.* at 77a (district court order) (distinguishing *Bodner*).

First, the *Garamendi* Court did not hold, as Respondents would have it, that California's approach to Holocaust-era claims conflicted with any *particular* executive agreement or statement; on the contrary, the Court held that California's policy conflicted with the more general "foreign policy those agreements *embody*." 539 U.S. at 417 (emphasis added); *see also id.* at 422 (noting that the various agreements that had been concluded were "*exemplars*" of the Executive's more general policy favoring negotiations) (emphasis added).

Second, Respondents' (and the Ninth Circuit's) approach is contradicted by the post-*Garamendi* decisions of other courts addressing the same question. Thus, for example, the California Court of Appeal, in a published decision, recently rejected exactly the same argument, and in so doing, explicitly rejected the Ninth Circuit's decision in this case:

> Plaintiffs suggest that *Garamendi* is distinguishable because their class is limited to policyholders and heirs whose claims were rejected by Generali, *an Italian company not subject to the executive agreements signed with Germany and Austria.* The distinction is irrelevant. It is not the executive agreements themselves which dictated the result in *Garamendi, but the policy reflected in them, a policy which extends to claims against Generali....*
>
> Plaintiffs rely on *Alperin v. Vatican Bank* (9th Cir.2005) 410 F.3d 532, petition for certiorari filed September 7, 2005, which allowed an action for recovery of assets looted by the Croatian Ustasha regime, which had been supported by the Nazis. In *Alperin*, the Ninth Circuit found the fact that the State Department did not intervene in the case to imply that the court need not defer to the political branch for resolution of the dispute. (*Id.* at pp. 555-557.) *We disagree; under* Garamendi, *it is the foreign policy reflected in the executive agreements that is dispositive,*